No. 79-64

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., individually and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation; and JANE DOE, individually and on behalf of all others similarly situated,

Petitioners,

v.

JEFFREY C. MILLER, Acting Director, Illinois Department of Public Aid, JASPER F. WILLIAMS, M.D., and EUGENE F. DIAMOND, M.D., and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATE RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM J. SCOTT
Attorney General of the State of Illinois
160 North LaSalle, Suite 900
Chicago, Illinois 60606
(312) 793-2501

Counsel for State Respondents.

WILLIAM A. WENZEL
ELLEN P. BREWIN
Special Assistant Attorneys General
130 North Franklin, Suite 300
Chicago, Illinois 60606
(312) 793-2380

Of Counsel.

Printed by the Authority of the State of Illinois—10-79-40

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The respondent, Jeffrey C. Miller, Acting Director of the Illinois Department of Public Aid,[1] respectfully requests that

[1] Arthur F. Quern resigned as the Director of the Illinois Department of Public Aid, effective September 1, 1979. Jeffrey C. Miller has been appointed as Acting Director of the Illinois Department of Public Aid. Supreme Court Rule 48(3) provides that under such circumstances Jeffrey C. Miller should be automatically substituted as a party.

this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 596 F.2d 196.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

REVIEW OF THE COURT OF APPEALS' DECISION WILL NOT AID THIS COURT IN AVOIDING CONSTITUTIONAL ADJUDICATION.

Petitioners, plaintiffs below, have conditionally argued that this Court's consideration of the statutory questions presented in their petition for certiorari would allow this Court to avoid deciding the important constitutional questions presented by respondents in their respective appeals to this Court. The judicial preference for the avoidance of constitutional adjudication, plaintiffs claim, provides ample reason for this Court's granting the writ of certiorari.

This novel argument fails to present any convincing reasons why certiorari should be granted. First, this Court has set forth the various considerations which would enter into its determination to grant certiorari in a given case in Supreme Court Rule 19(1)(b). There is absolutely no indication in that rule that the avoidance of constitutional adjudication is a factor which would in any way motivate this Court to exercise its jurisdiction.

Second, the plaintiffs' argument fails to take into account the very strong possibility that this Court may very well affirm the Seventh Circuit's finding that the Hyde Amendment substantively amended Title XIX of the Social Security Act. If that were to occur, then this Court would still be faced with the constitutional issues raised in the appeals from the district court's order. Plaintiffs' have, of course, argued that those constitutional issues are not properly before this Court, but as respondents will demonstrate in Section III of this brief, the

equal protection issues are, and have been, an integral part of this case since its inception. Therefore, the rule against unnecessary constitutional adjudication, even if relevant to the exercise of jurisdiction, would be furthered only if this Court accepts petitioners' arguments as to the merits of their case.

Most importantly, it is the state defendant's contention that plaintiffs' claims can be raised in the context of defendants' appeals to this Court from the district court's opinion. Those appeals were taken under 28 U.S.C. § 1252, which provides for a direct appeal to this Court when a statute of the United States has been declared unconstitutional.[2] An appeal under § 1252 brings the *entire* case before this Court, thus allowing the Court to consider all other issues arising from the case, including non-constitutional ones. *United States* v. *Raines,* 362 U.S. 17, 27, n. 7 (1960); *McLucas* v. *DeChamplain,* 421 U.S. 21, 32-33 (1975). The conditional petition for certiorari is, therefore, needless.

Plaintiffs argue that certain decisions of this Court preclude review of the court of appeals' decision in the § 1252 case, relying on *Farmers and Mechanics Nat'l Bank* v. *Wilkinson,* 266 U.S. 503 (1925) and *Union Trust Co.* v. *Westhus,* 228 U.S. 519 (1913). At the time those cases were decided, the applicable jurisdictional statute, provided for direct appeals to the Supreme Court from interlocutory or final judgments of district courts in five instances. For example, any case involving the construction or application of the Constitution of the United States, in which the constitutionality of any law of the United States was drawn into question or in which the Constitution or law of a state was claimed to be in contravention of the Constitution of the United States could be appealed directly from the district court to the Supreme Court.

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[2] 28 U.S.C. § 1252 also provides that a party who has received a notice of appeal under § 1252 "shall take any subsequent appeal or cross appeal to the Supreme Court,. . . ." This section obviously intended to give this Court *appeal* jurisdiction over the entire case.

In 1925 Congress amended the judicial code and abolished the very expansive categories of obligatory jurisdiction cited above. The direct appeal jurisdiction of the Supreme Court under § 1252 was narrowed to the single instance wherein an Act of Congress was declared unconstitutional and where the United States has decided to intervene as a party.[3] Act Feb. 13, 1925, ch. 229, 43 Stat. 938. Thus the statute was substantially altered.[4] The drain on this Court's time and resources caused by the almost unlimited number of cases which fell within the confines of the former statute was certainly a major factor in the Court's restrictive interpretation of that statute in the *Wilkinson* and *Westhus* cases cited by the petitioners.

While this Court has continued to strictly interpret the mandatory jurisdictional statutes, such as 28 U.S.C. § 1253, *see, e.g., Gonzales* v. *Automatic Employees Credit Union,* 419 U.S. 90 (1974), cases brought under 28 U.S.C. § 1252 have not been subject to the same approach. *McLucas* v. *DeChamplain, supra,* 421 U.S. at 32. In that case this Court specifically held that "in § 1252 Congress unambigously mandated an exception to this policy in the narrow circumstances that the section identifies. . . ." *Id.* Justice Powell, speaking for the Court, clearly enunciated the rationale behind the exception:

> . . . to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality.

As the jurisdictional statute has changed so substantially since the time of the decisions cited by petitioners, those decisions cannot be said to represent the current state of the law

[3] Direct appeal jurisdiction from a three judge district court is also granted under 28 U.S.C. § 1253. Cases in which a state statute is held invalid as repugnant to the United States Constitution, laws or treaties are governed by 28 U.S.C. § 1254(2).

[4] Another change in the statute is that this Court has held that § 1252 jurisdiction encompasses cases from the circuit courts of appeal. *Parker* v. *Levy,* 414 U.S. 973 (1973).

on the direct appeal jurisdiction of this Court and should be considered as obsolete.[5] When a federal statute has been declared unconstitutional by a district court, Congress has obviously evidenced its intent that such decision be given prompt consideration by this Court. The related appeal is just such a case, and involves important issues of national interest. As previously stated, when an appeal is brought under § 1252, it brings the whole case before this Court. Since petitioners' arguments could be included in the appeals in this case which are presently before this Court,[6] their petition for certiorari is unnecessary and should be denied.

II.

THE DECISION OF THE COURT OF APPEALS IS PLAINLY CORRECT.

The state defendant believes that a detailed argument on the merits of the federal statutory issue is unnecessary, and that the opinion of the Court of Appeals as to the questions presented by plaintiffs is well reasoned and correct. Since plaintiffs have urged, however, that the granting of their petition for certiorari would permit disposition of the entire case without reaching the constitutional issues raised in the appeals, defendant will briefly discuss the Seventh Circuit's ruling in order to demonstrate that this Court will have to reach the constitutional issues even if the petition is granted.

[5] Should this Court grant petitioners' Petition for Certiorari and find no jurisdiction over the appeals (a circumstance apparently under which petitioners are not seeking certiorari), this Court might then be faced with the same issues on appeal a second time. If respondents pursued an appeal to the court of appeals and it affirmed the district court's decision, then § 1252 jurisdiction again would be provided. That would create the effect of a bifurcated appeal and certainly be detrimental to the interests of judicial economy.

[6] Those appeals are presently docketed before this Court as Nos. 79-4, 79-5 and 79-491.

Plaintiffs have argued that the effect of the Hyde Amendment[7] is simply a withholding of federal funds, and that Congress did not intend to make substantive changes in Title XIX of the Social Security Act. They claim that the court below erroneously interpreted the legislative history of the act in reaching its conclusion. The court below, however, undertook a careful analysis of the congressional debates was convinced by several relevant factors that a substantive amendment of Title XIX was intended by Congress.[8] First, the court was impressed by the absence of any suggestion, by either proponents or opponents of the legislation, that state funding of abortions would be required to continue despite the lack of federal funds. As the court stated, ". . . the assumption was that when federal funds were withdrawn, the states . . . would refuse to do so."[9] *Zbaraz, supra,* 596 F.2d at 200. The court also relied upon the fact that throughout the debates a common conviction was frequently expressed that taxpayers should not finance abortions to which they were opposed for moral or religious reasons. If the states were still required to fund abortions, then those strongly held beliefs would not be furthered whatsoever.

[7] For the last three years Congress has passed a rider to the annual HEW appropriations. The amendments have become commonly known as the "Hyde Amendment" although Congressman Hyde has not always been the sponsor of the rider. For purposes of this brief, the riders will be referred to as the "Hyde Amendment." although technically speaking the FY 1977 rider is Pub. L. No. 94-439, § 209 (1976); FY 1978 rider is Pub. L. No. 95-205, § 101 (1977) and FY 1979 rider is Pub. L. 95-480, § 210 (1978).

[8] Petitioners also argue that resort to the legislative history was inappropriate. The Seventh Circuit correctly found that it was necessary to consult the legislative history of the Hyde Amendment "because not all of the obligations of the states are clearly spelled out in that statute, and because those obligations arise in the context of a plan for sharing expenses between the federal and state governments." *Zbaraz* v. *Quern,* 596 F.2d 196, 200 (7th Cir. 1979).

[9] The court noted that a few Congressmen and Senators stated that the amendment would merely restrict federal funding, but found that in the context presented the "remarks were meant only to distinguish between a total ban on abortions and a refusal to pay for abortions." *Id.*

Plaintiffs argument also fails to recognize that their position requires the finding that Congress repealed by implication the basic funding design of Title XIX—that the federal government and participating states *share* in the funding of medical assistance on a roughly 50/50 basis. 42 U.S.C. § 1396(b)(a)(7). There is nothing in either the language of the Hyde Amendment or the legislative history which would indicate that Congress intended to radically alter the basic funding mechanism of Title XIX.[10] If Congress had intended to make such grave changes in the scheme of cooperative federalism, it certainly would have done so expressly. Finally, Congress has enacted substantially the same provision for three successive fiscal years with respect to Title XIX abortion funding.[11]

[10] The court below recognized that Medicaid and other related statutes do require complete funding of minor portions of the program by the state alone, but "when Congress has imposed such conditions, it has done so explicitly and for the apparent purpose of encouraging the states to undertake programs Congress deems desirable . . . it . . . clearly did not intend to encourage abortions." *Id.,* n. 12.

[11] With respect to the fiscal 1980 HEW appropriations measure presently before Congress an interim funding measure for the period of October 1, 1979 through November 20, 1979 has been passed which provides:

> SEC. 118 Notwithstanding any other provision of this joint resolution except section 102, none of the Federal funds provided by this joint resolution for the District of Columbia, Foreign Assistance and Related Programs, the Departments of Labor and Health, Education, and Welfare, or the Department of Defense shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service.

Congressional Record, H.R.J. Res. 412, 96th Cong., 2nd Sess., 92 Cong. Rec. H 9081 (1979).

The above are all clear and convincing indicia that Congress did intend to change the Social Security Act's coverage with respect to abortions with the Hyde Amendment. Moreover, despite petitioners' claims to the contrary, it is well established that Congress does have the power to make substantive changes in the law by way of an appropriations bill. *United States* v. *Dickerson,* 310 U.S. 554 (1940).[12] This Court has, of course, recently expressed disapproval of repeals by implication and set forth several considerations to be weighed in determining whether a repeal has been effected. *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153 (1978). The most important of the considerations is perhaps that the amendment manifest the clear intention of the legislature to repeal prior law, 437 U.S. at 129,[13] and as the court below noted, in this regard "the circumstances under which the Hyde Amendment was passed distinguish it from the *Hill* case."
Zbaraz, supra, 596 F.2d at 201.

The language of the statute expressly prohibiting expenditure of funds for abortions evidences a *specific* intent with respect to a *specific medical procedure.* It is distinguishable from congressional approval of the general T.V.A. budget which as a matter of course included funds for the Tellico dam. The Hyde Amendment is attached to the appropriations act for the very statute it was intended to amend. In comparison, the

[12] In several cases subsequent to *Dickerson,* courts have construed congressional appropriations measures *prohibiting* the use of federal funds in a particular manner to have worked substantive modifications of prior law. *See, Eisenberg* v. *Corning,* 179 F.2d 275, 276 (D.C. Cir. 1949); *Friends of the Earth* v. *Armstrong,* 485 F.2d 1, 9 (10th Cir. 1973), *cert. denied* 414 U.S. 1171; *City of Los Angeles* v. *Adams,* 556 F.2d 40, 48-49 (D.C. Cir. 1977).

[13] The other factors to be weighed are the express terms of the appropriations measure; the legislative history of the bill; the awareness of Congress as a whole as to the possible conflict between the funding provision and prior law; the existence of a clear repugnancy between the old and the new law.

act in the *Hill* case which was allegedly repealed was the Endangered Species Act—an entirely unrelated and independent act from the T.V.A. act. Moreover, the Hyde Amendment continues to be in the form of limiting previously authorized expenditures rather than permitting formerly prohibited expenditures as in *Hill.* In addition, there was no indication in the *Hill* case that Congress was aware as a whole that the appropriations bill was working a repeal of the Endangered Species Act. In the instant case, it is more than evident that Congress has been aware of the substantive nature of abortion funding limitations since it has forcefully debated the issue each year since 1977.

The ruling of the court below does not conflict with the decisions of the only other circuit court of appeals which has considered the issue. *Preterm Inc.* v. *Dukakis,* 591 F.2d 121 (1st Cir. 1979). In fact both courts examined the legislative history and the Act itself following the directives set forth in the *Hill* case. Both courts reached the conclusion that Congress intended to substantively amend the Medicaid Act when it passed the Hyde Amendment. If a state were required to fund all "medically necessary" abortions as petitioners claim, then not only would the very purpose of the Hyde Amendment be totally eviscerated, but so would the cooperative federal-state structure of the Medicaid Act.

III.

THE CONSTITUTIONALITY OF THE HYDE AMENDMENT IS SQUARELY AT ISSUE IN THIS CASE.

Plaintiffs claim that they have never challenged the constitutionality of the Hyde Amendment and that the Seventh Circuit erroneously directed the district court to consider that issue. Obviously petitioners are somewhat reticent about bringing that issue before this Court, although they have appeared confident throughout the litigation that Illinois's rated

the statute which is substantially similar runs afoul of the Constitution. When the court below reached the conclusion that Title XIX was substantively amended, then the question regarding the constitutionality of the state statute became irrevocably intertwined with the constitutionality of the Hyde Amendment. Moreover, once the Seventh Circuit found that the more restrictive portions of the Illinois statute were not in compliance with Title XIX, then both the Illinois statute as construed and the Hyde Amendment became identical. Thus, any resolution of the constitutional issues will pertain equally to either statute.

It must also be kept in mind that the program under consideration is the joint federal-state Medicaid plan. If the court had failed to order consideration of the federal statute and the lower court had found any part of the state statute unconstitutional, then the state would be required to fund medical procedures for which the federal government would not provide reimbursement. This would create the anomalous situation whereby the state could not get federal reimbursement for a procedure required by a federal court, yet the very statute relied upon by the federal government for lack of funds would be identical to the state statute which the federal court held unconstitutional. Failure to consider both statutes, therefore, would have the potential effect of irreparably altering the basic nature of the compact between Illinois and the federal government under Title XIX of the Social Security Act.

Finally, Respondents have all formally taken the position in the district court that they were entitled to summary judgment pursuant to Federal Rules of Civil Procedure, Rule 56 based upon the constitutionality of the Hyde Amendment under the Fifth Amendment. The issue of the Hyde Amendment was therefore squarely brought into the case in two ways. First, of necessity by the court below because of the inextricably intertwined nature of the state and federal law, and secondly, by virtue of respondents' motions for summary judgment.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General of the State of Illinois
160 North LaSalle, Suite 900
Chicago, Illinois 60606
(312) 793-2501

Counsel for State Respondent.

WILLIAM A. WENZEL
ELLEN P. BREWIN
Special Assistant Attorneys General
130 North Franklin, Suite 300
Chicago, Illinois 60606
(312) 793-2380

Of Counsel.